APPEAL NO. 93439

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on May 5, 1993, to determine the following unresolved issue from the benefit review conference: what is claimant's correct date of maximum medical improvement (MMI) and impairment rating? (A second issue concerning whether the claimant had been examined by the designated doctor was waived by agreement of both parties.) The appellant, hereinafter carrier, appeals hearing officer determination that the claimant reached MMI on November 20, 1992, with an impairment rating of seven percent, as found by the designated doctor. The carrier contends that the first impairment rating and MMI certification became final because they were not timely disputed and that such should be considered final; in the alternative, carrier contends that MMI was not in dispute when the claimant was seen by the designated doctor, and that therefore, the designated doctor's impairment rating should be adopted, along with an earlier doctor's date of MMI. The respondent, hereinafter claimant, contends that the hearing officer correctly determined claimant's MMI and impairment.

DECISION

We affirm the hearing officer's decision and order.

The claimant suffered an injury at work on (date of injury), while lifting a bag of cement. He was originally seen by (Dr. A), who diagnosed left hip injury, low back injury, and left inguinal hernia (claimant underwent surgery to repair the hernia on April 1st). He also was treated by an orthopedic surgeon, (Dr. HA). On July 19th the carrier requested a medical examination order (MEO) from the Texas Workers' Compensation Commission (Commission), giving the following reason: "[t]o obtain MMI. It has been 180 days since carrier has requested an MEO." This request was granted and claimant was seen by (Dr. HE) on September 3rd. Dr. HE summarized claimant's treatment and the results of his studies, and certified MMI as of September 6, 1991, with a five percent whole body impairment. The record does not reflect when the claimant received notice of Dr. HE's impairment rating.

On December 24, Dr. HA wrote the carrier that he did not agree with Dr. HE's evaluation of the claimant because he did not believe Dr. HE had thoroughly followed the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides). Dr. HA thereafter certified MMI as of January 20, 1992, with a 17% impairment rating.

The record reflects that on January 23rd, the carrier requested a benefit review conference, stating as follows: "Claimant has been treating with [Dr. HA] since June, 1991. An MEO (sic) dated September 6, 1991, done by [Dr. HE], states that the claimant's impairment is 5% and that the claimant does not need further acute physical therapy treatment. We would like MMI to be declared and the 5% disability to be accepted."

Chronologically next in the record, however, was a July 8th order appointing Dr. L) as "designated doctor requested to resolve dispute regarding [MMI] and impairment rating."

By letter to the claimant of September 9, 1992, the carrier stated its disagreement with Dr. HA's January 20th 17% impairment rating, along with its reasonable assessment of an 11% impairment rating and the fact that impairment benefits had been paid pursuant to that assessment. The carrier also noted claimant's upcoming appointment with the designated doctor, Dr. L.

Apparently Dr. L never examined the claimant, and on October 23rd the Commission appointed (Dr. O) as designated doctor to resolve a dispute over MMI "and/or" impairment rating. On November 20, 1992, Dr. O filed a lengthy report certifying MMI as of that date with a seven percent impairment rating.

The hearing officer held that the great weight of the other medical evidence was not contrary to the report of the designated doctor. The carrier alleges error in the hearing officer's decision for the following reasons: 1. Dr. HE's September 6, 1991 certification of MMI and impairment rating were the first assigned to claimant and, not having been disputed within 90 days by either party, should be considered final; 2. MMI was not in dispute when carrier filed its TWCC-21, nor when claimant was examined by Dr. O. Dr. O did not have standing to dispute the first certification by Dr. HE, or the subsequent certification by Dr. HA. Dr. HA's January 20, 1992, certification of MMI should stand, as well as Dr. O's impairment rating of seven percent. Carrier thus asks this panel to reverse the hearing officer's decision and render a new decision that claimant reached MMI on September 6, 1991, with a five percent impairment rating, or in the alternative to reverse and render a new decision that claimant reached MMI on January 20, 1992 (per Dr. HA) with an impairment rating of seven percent (per Dr. O).

With regard to the carrier's first issue, Rule 130.5(e) provides that the first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned. The record before us does not reflect, however, that this issue was raised at the benefit review conference which was the genesis of this contested case hearing. The 1989 Act provides that the issues resolved at a benefit review conference and those issues not raised at the benefit review conference may not be considered except by consent of the parties or unless the Commission determines that good cause existed for not raising the issue at the earlier proceedings. Article 8308-6.31. *See also* Rule 142.7, which provides that "a dispute not expressly included in the statement of disputes will not be considered by the hearing officer;" Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. The record does not reflect that the carrier sought to have the timely dispute issue added to the statement of disputed issues at the hearing. The hearing officer's failure to accept Dr. HE's MMI date and impairment rating for this

reason thus was not error.[1]

The carrier's second point of error also is without merit. Not only does the designated doctor not lack "standing" to determine claimant's MMI, Article 8308-4.26(d) presumes that a doctor shall assign an impairment rating only after having certified that the employee has reached MMI. In addition, the Commission rule on designated doctors (Rule 130.6) requires the designated doctor to file a medical evaluation report which includes both a determination of MMI and an impairment rating under Rule 130.1; as such, the two issues may become somewhat inextricably tied together. Texas Workers' Compensation Commission Appeal No. 92366, decided September 10, 1992; Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992; Texas Workers' Compensaiton Commission Appeal No. 93124, decided April 1, 1993. The hearing officer in this case thus did not err in accepting the MMI date, as well as the impairment rating, of the designated doctor.

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge

[1]It is not clear from the record whether carrier's January 23, 1992, request for a benefit review conference, which appears to indirectly raise the issue of finality of Dr. HE's MMI and impairment, resulted in the benefit review conference held March 15, 1993. The parties' respective positions, as stated in the report of that conference, do not discuss the 90-day dispute requirement and the report does not mention Dr. HE's determination at all.